

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VASE CALVIN VALRIE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Vase Calvin Valrie and co-defendant Thomas Winfrey were indicted by the Federal Grand Jury on April 13, 1961, for the Southern District of California, Central Division and charged with violation of Title 21, United States Code, Section 174 [C. T. 2]. ^{1/} The Indictment is in four counts. Appellant is charged in the four counts of the Indictment and co-defendant Winfrey is charged in Counts Three and Four only.

Count One charges that on or about January 12, 1961, in Los Angeles County, appellant knowingly and unlawfully sold and

^{1/} "C. T." refers to Clerk's Transcript of Record.

facilitated the sale to William Green, of 42 grams of heroin, a narcotic drug, which, as the appellant then and there well knew had been imported into the United States of America contrary to Title 21, United States Code, Section 173.

Count Two relates the same date and quantity of heroin in Count One and charges that appellant knowingly and unlawfully received, concealed and facilitated the concealment and transportation of said heroin.

Count Three charges that on or about January 25, 1961, in Los Angeles County appellant and co-defendant Winfrey knowingly and unlawfully sold and facilitated the sale to William Green, of 56.860 grams of heroin, a narcotic drug, which as appellant and co-defendant then and there well knew, had been imported into the United States of America contrary to Title 21, United States Code, Section 173.

Count Four relates to the same date and quantity of heroin as in Count Three and charges that appellant and co-defendant Winfrey knowingly and unlawfully received, concealed and facilitated the concealment and transportation of said heroin.

On April 17, 1961, appellant was arraigned in Case No. 29673-CD before the Honorable Harry Westover, United States District Court Judge [C. T. 6]. On May 15, 1961, appellant again appeared before Judge Westover and entered a plea of not guilty to the four counts of the Indictment. Appellant was represented by counsel, Mr. Harvey Byron, at this time [C. T. 9].

On September 5, 1961, Case No. 29673-CD was called for

trial before the Honorable William C. Mathes, United States District Court Judge. At this time a jury waiver was signed by all parties in this case and filed with the Court [C. T. 19]. A written stipulation was entered into by all parties to this case "that William Green, a percipient witness to certain events alleged in the Indictment in the said cause, is unavailable to testify at the trial of the said cause for the reason that he is dead."

[R. T. 6]. 2/

On September 6, 1961, the Court found appellant guilty as charged in Counts One and Two of the Indictment and not guilty as to Counts Three and Four. The Court acquitted co-defendant Winfrey as to Counts Three and Four of the Indictment [C. T. 23; R. T. 22].

An Information regarding appellant's prior conviction was filed with the Court on September 6, 1961 [C. T. 21; R. T. 23]. On the same date, the Court sentenced appellant to the custody of the Attorney General or his authorized representative for a period of 20 years for the offense charged in Count One of the Indictment, and for a like period of 20 years for the offense charged in Count Two of the Indictment [R. T. 41]. It was further adjudged that the sentence imposed in Counts One and Two shall commence and run concurrently [R. T. 42].

On September 12, 1961, a timely notice of appeal was filed by appellant [C. T. 24].

2/ "R. T. " refers to Reporter's Transcript.

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291, 1294.

II

STATUTES INVOLVED

Section 174 of Title 21, United States Code, provides in pertinent part that:

"Whoever . . . knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense, . . ., the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this

section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

STATEMENT OF THE FACTS

In December 1960, Federal Bureau of Narcotics agents arrested one William Green in San Francisco, California. Subsequently Mr. Green agreed to work as an undercover aide to make buys of heroin for the Federal Bureau of Narcotics [R. T. 14, 15].

On January 10, 1961, Agent Robert Nickoloff of the Federal Bureau of Narcotics came to Los Angeles, California for the express purpose of "purchasing evidence from various defendants". At about midnight on January 10, 1961, Agent Nickoloff met with Mr. Green at the intersection of La Brea and Washington Streets in Los Angeles, California, a prearranged location [R. T. 15, 57]. Agent Nickoloff and Mr. Green proceeded to the Royal Hawaiian Motel at 1632 La Brea, Los Angeles, California, where room No. 11 was rented for Mr. Green. Agent Nickoloff and Agents George E. Olsen and John Warner, California State Narcotics Officers, rented rooms No. 1 and 2 so as to maintain surveillance of room No. 11 [R. T. 17, 58, 148, 169].

At about 4:00 A. M. on January 11, 1961, Mr. Green was

observed to leave the motel room and return at about 8:30 A. M. Mr. Green again left about noon and returned about 6:00 P. M. and again at about 6:30 P. M. returning at about 7:30 P. M. [R. T. 18].

At approximately 7:40 P. M. on January 11, 1961, Mr. Green placed a call from a public phone booth, at the request of Agent Olsen, to the appellant by dialing PL 8-8515. This telephone conversation was monitored by Agent Olsen with a twin-phone, a small device placed on the ear piece of the telephone with a hearing piece extending from it [R. T. 18, 19, 60, 91, 92, 95].

Agent Olsen testified that he recognized the voice of the receiver of the call as that of the appellant and that the party identified himself as "Val" and that "he (Val) was waiting for Alvin Green" and that "he would be by in about an hour" [R. T. 93, 94, 97].

At about 10:45 P. M. and again at about 12:15 A. M. Mr. Green called the same number and these conversations were also monitored by use of the twin-phone device [R. T. 17, 61, 97].

Agent Nickoloff testified that when the 12:15 A. M. phone call was placed Mr. Green said, "is Val there?" and the person on the other end said "no, he is already on his way over there. He's met the man and has the stuff." [R. T. 22].

Room No. 11 was then searched by Agents Nickoloff and Olsen. Mr. Green was searched by Agent Nickoloff with the result that narcotics were not found in the room or on the person of Mr. Green [R. T. 66]. The sum of \$500.00 was placed in Mr. Green's suitcase for his use in the purchase of heroin [R. T. 23, 140].



At about 12:45 A. M. on January 12, 1961, appellant arrived driving a 1960 Chevrolet with California License No. ULJ 587 [R. T. 26, 34, 61].

The agents thereafter met with Mr. Green and ascertained that he still had the \$500.00 [R. T. 26, 34, 62]. A fargo transmitter which had been placed in room No. 11 was adjusted by Agent Nickoloff to make it operative [R. T. 26].

Appellant returned at approximately 2:20 A. M. driving the same vehicle. By means of the fargo transmitter, appellant was overheard to say that "the man . . . has 4 pieces and has to cut it up. It won't be ready until morning." [R. T. 38]. Appellant left at approximately 2:30 A. M. [R. T. 37, 69].

At about 7:30 A. M. on January 12, 1961, Mr. Green placed a call to appellant at PL 8-8515. Agent Olsen monitored this conversation by means of the twin-phone device and he testified that he recognized the voice of the person answering the telephone call as that of the appellant and that appellant said, "sit tight, I'll bring the stuff by in about 45 minutes" [R. T. 39, 99, 100]. Mr. Green and room No. 11 were searched at this time by the agents with the result that narcotics were not found in the room or on the person of Mr. Green. Mr. Green was again furnished with \$500.00 [R. T. 40].

At about 11:40 A. M., on January 12, 1961, appellant was observed arriving driving the same vehicle and entering room No. 11 and leaving about 5 minutes later. In about 2 minutes thereafter, Mr. Green handed Agent Nickoloff a rubber contraceptive containing

approximately 42 grams of heroin and entered in evidence as Government's Exhibit 2B. Agents Nickoloff and Olsen then searched Mr. Green and room No. 11 and did not find the \$500.00 [R. T. 9, 41, 42, 43, 70].

Agent Aubrey Roumo, Federal Bureau of Narcotics Agent, followed appellant after he left room No. 11 to a service station at 27th and Western Avenue, where appellant displayed a large roll of money [R. T. 193].

IV

ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal:

1. The introduction of evidence relating to the phone conversations between appellant and William Green violated the prohibition of Title 47, United States Code, Section 605.
2. The interception of the contents of the phone conversation between appellant and William Green constituted an unreasonable search and seizure as applied to appellant and violated the provision of the Fourth and Fifth Amendments to the United States Constitution.
3. The evidence is insufficient to establish that certainty of possession necessary to support the statutory presumption of unlawful importation.
4. The consideration of evidence of the statutory presumption of unlawful importation denied appellant due process of

law under the Fifth Amendment.

V

ARGUMENT

A. TESTIMONY RELATING THE TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND WILLIAM GREEN WAS PROPERLY ADMITTED.

The admission into evidence of the telephone conversations between appellant and William Green does not violate Title 47, United States Code, Section 605, as appellant claims, since the consent of Mr. Green had been obtained.

McClure v. United States, 332 F.2d 19

(9 Cir. 1964), cert. den. 380 U.S. 945.

Agents Nickoloff and Olsen testified to the conversations which they overheard by the use of a twin-phone device. The cases are in accord that testimony as to telephone conversations obtained by the use of a twin-phone device with the consent of only one of the parties to the conversations, does not constitute an "interception" within the meaning of Section 605 of Title 47, United States Code, and does not constitute an unreasonable search and seizure and thus is not violative of the United States Constitution.

Wilson v. United States, 316 F.2d 212 (9 Cir. 1963);

Williams v. United States, 290 F.2d 451

(9 Cir. 1961);

(9 Cir. 1956).

Both parties to a phone conversation are alternately senders and receivers, and thus either party may supply the requisite consent.

Rathbun v. United States, 355 U.S. 107,

reh. den. 355 U.S. 925.

The trial record in the present case supports the fact that Mr. Green had voluntarily consented to the monitoring of the conversations by the agents.

1. Mr. Green himself placed the call to appellant at the request of the agents.
2. The calls were placed at a public phone booth.
3. The twin-phone device employed is such that it could not have been used without Mr. Green's awareness.
4. Mr. Green had agreed to work as an undercover aide for the Federal Bureau of Narcotics.

Appellant argues that the fact that Mr. Green had been arrested prior to giving consent and the fact that he was "instructed" to make the calls in question, establishes that he did not in fact consent. This contention is without merit since there is no showing in the record that there was any unwillingness or refusal on the part of Mr. Green. In fact the record upholds the contention that he



readily complied with each request of the agents. Additionally there is no case authority for the proposition that the Government in this situation is required to carry the burden of showing the voluntariness of the consent.

Appellant relies on Weiss v. United States, 308 U.S. 321 for his contention that Mr. Green's consent was not voluntarily given. However, the Weiss case is distinguishable from the case at hand. In the Weiss case, at the time the communications were overheard, all participants were ignorant of the interception and there had been no consent until after the calls had been placed and they had been informed of the "interception".

Therefore, the agent's testimony as to the telephone conversations between appellant and the undercover aide, overheard by use of a twin-phone device with the consent of the aide, was admissible and does not constitute an unreasonable search and seizure.

United States v. Pierce, 124 F. Supp. 264 (1954),
aff'd. 224 F.2d 281.

**B. THE EVIDENCE OFFERED BY THE
GOVERNMENT WAS SUFFICIENT TO
SUSTAIN THE CONVICTION.**

In a criminal case evidence upon appeal is viewed in the light most favorable to the Government.

Hiram v. United States, 354 F.2d 4, 7 (9 Cir.1965);

Stein v. United States, 337 F.2d 14, 16

(9 Cir. 1964);

Mosco v. United States, 321 F.2d 180, 181

(9 Cir. 1963), cert. den. 371 U.S. 842.

This rule also includes all inferences to be drawn from the evidence.

Yeargain v. United States, 314 F.2d 881, 882

(9 Cir. 1963).

The summary of the evidence offered by the Government and believed by the Court in the present case clearly establishes that appellant did sell 42 grams of heroin to the undercover assistant [9, 41-43, 70].

The circumstantial evidence which establishes the appellant's possession of the heroin is as follows:

(1) Mr. Green, the undercover aide was in contact with appellant by phone and in person [R. T. 93, 94, 97].

(2) During the contacts arrangements were made for appellant to sell approximately 2 ounces of heroin to Mr. Green for \$500 [R. T. 41-43, 70].

(3) On January 12, 1966, at about 2:15 A.M. in room No. 11 there was a conversation where appellant told Mr. Green that he could not deliver until morning since the "stuff was being cut" [R. T. 38, 39, 99, 100].

(4) Appellant was physically present at the scene of the transaction [R. T. 24, 37, 38, 69].

(5) When the agents knew that appellant was on his way to deliver, they searched room No. 11 and Mr. Green and did not find any narcotics [R. T. 40].

(6) Appellant arrived at about 11:40 A. M. on January 12, 1961, and left at about 11:45 A. M. [R. T. 41, 70].

(7) About two minutes thereafter, Mr. Green handed a rubber contraceptive containing 42 grams of heroin to Agent Nickoloff [R. T. 9, 42, 43, 70].

(8) Appellant was followed to a gas station where he was seen displaying a large roll of money [R. T. 193].

(9) Mr. Green and room No. 11 were searched and the \$500 previously left with Mr. Green by the agent for his use in the purchase of heroin was not found [R. T. 42].

Appellant knowingly and willfully participated in the illicit sale and distribution of the heroin, since appellant indicated that he would bring the "stuff" or heroin by and appellant employed the jargon of the narcotics trade when he told Mr. Green that the "man has four pieces" and the "stuff" was being "cut" [R. T. 38, 39, 99, 100]. In addition, subsequent to the January 12, 1961 sale, another meeting took place on January 25, 1961, between Mr. Green and appellant. At this time there were telephone conversations between Mr. Green and appellant arranging the sale of two ounces of heroin

for \$500.00 further indicating appellant's ready compliance and willingness to engage in the illicit narcotics traffic [R. T. 134-138].

C. THE EVIDENCE WAS SUFFICIENT TO
ESTABLISH APPELLANT'S POSSESSION
OF THE HEROIN.

Possession may be either actual or constructive, and proof of dominion and control over narcotics sufficient to establish possession thereof may be by use of either circumstantial or direct evidence.

Rodella v. United States, 286 F.2d 306

(9 Cir. 1960).

In the instant case, due to the fact that Mr. Green was dead at the time of trial, the Government relied primarily upon circumstantial evidence to prove its case against appellant.

In view of the overwhelming circumstantial evidence as is set out in Section B above, it is respectfully submitted that this evidence was sufficient to establish that appellant did have possession of the heroin.

United States v. Malfi, 264 F.2d 147 (2 Cir. 1959),

cert. den. 361 U.S. 817.

The fact of such possession, unless satisfactorily explained, raises the inferences that the heroin was brought or imported into the United States of America contrary to law and that appellant had knowledge that the narcotic drug was imported or brought in contrary

to law. These statutory presumptions have been unequivocally upheld.

Anthony v. United States, 331 F.2d 687

(9 Cir. 1964);

Brothers v. United States, 328 F.2d 151

(9 Cir. 1964);

Medrano v. United States, 315 F.2d 361

(9 Cir. 1963);

Cellino v. United States, 276 F.2d 941

(9 Cir. 1960).

This Court is required to regard all evidence and all inferences that might be drawn therefrom most favorable in support of the judgment of the trial court.

Rios v. United States, 283 F.2d 134

(9 Cir. 1960).

CONCLUSION

For the reasons stated above it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

